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LIMITED PARTNERSHIPS AND COMPLIANCE WITH STATUTE.

RECORDATION OF ARTICLES, LIABILITY OF PARTNER AND ADMISSIBILITY OF EVIDENCE.

In the note to the case of R. S. Oglesby Co. *v.* Lindsey et al., reported in the February number of the REGISTER, it is said: "This is an important decision passing upon many points arising in the construction of an important statute, that relating to limited partnerships."

That this is true, no one familiar with the statute will gainsay. It is the first decision in the Commonwealth construing those sections of ch. 135 of the Code relating to the formation and organization of limited partnerships, and the liability of special partners thereunder, and the importance of the decision to the members of the bar is my excuse for this article.

The case was tried at the November term, 1910, of the Circuit Court for Grayson County, before Hon. T. L. Massie, judge of the twenty-first Circuit, an able, careful, painstaking judge.

In deciding the questions presented to him, he was, as Chief Justice Marshall once said in one of his great opinions, compelled to explore "an unbeaten path, with few, if any, aids from precedents or written laws."

It was contended by the plaintiff, that the four special partners were liable as general partners, by reason of their failure to comply with the statutes relating to limited partnerships. This was combatted by the defendants.

While T. L. Felts, one of the special partners, was on the witness stand, he was asked the question by his counsel if he had ever withdrawn any portion of the money he put into the firm,

or had ever drawn any dividends therefrom. Mr. Felts, over the objection of the plaintiff, was permitted by Judge Massie to answer this question, and this action of the court was excepted to by the plaintiff.

Section 2872 of the Code, among other things, provides as follows: "During the continuance of the partnership no part of any sum which any special partner has contributed to the stock shall be withdrawn, nor shall any division of interest or profits be made, so long as the stock is reduced below the sum stated in the paper."

This section further provides that should the special partner withdraw or receive any sum from the partnership during its continuance and the partnership be unable to pay its debts, then the special partner should be liable for all sums withdrawn or received, with interest, or so much thereof as may be necessary to pay the debts.

Under this section it was pertinent and relevant to show what sum, or sums, the special partner had or had not withdrawn during the continuance of the partnership, in order to fix or escape liability as a general partner. If he had received or withdrawn money from the firm, he was liable as a general partner. On the other hand, if he had not withdrawn money from the firm, he was not liable as such. It was under the section cited, and this section alone, that the trial judge permitted Mr. Felts to answer the foregoing question. But for it, he would have excluded the evidence.

Notwithstanding § 2872, the Supreme Court, in passing on this point, held it to be wholly immaterial to the issue whether Felts had or had not lost the money he put into the firm, or had or had not received any dividends from the business. Judge Massie had § 2872 before him when he decided the question. He based his decision thereon, and admitted the evidence by reason thereof. The Supreme Court reversed the Circuit Court on the point, without citing, referring to or construing § 2872. We are therefore still in the dark as to the meaning of this section.

Another point before the Supreme Court was whether or not the certificate of copartnership (called paper in the statute),

had been admitted to record in a separate book kept for the purpose, as required by § 2866 of the Code.

The evidence in the case showed that the paper had been carefully prepared and as carefully executed by all the partners; that one of the special partners had taken it to the clerk to be admitted to record; that the clerk had spread it in a separate book kept for that purpose and indexed it in the name of "Limited Partnership," instead of as "Lindsey Mercantile Co.," Limited.

Plaintiff in the trial court contended the paper was not properly recorded or indexed; that the clerk had not done his duty. Defendants denied this, and took the further position that if it were true that the clerk had not properly recorded and indexed the paper, still the special partners were not liable, as they had done their full duty, and all they could do to relieve them from liability, by leaving the paper with the clerk to be recorded, and that from this time the paper was admitted to record.

In the upper court, plaintiff in error relied upon the case of Vicars *v.* Sayler, 111 Va. 307, 68 S. E. 988, whereby the court held that a *lis pendens* must be recorded and indexed, else it was not notice to purchasers.

Defendants in error relied upon that line of cases, of which Virginia, etc., Loan Co. *v.* Glenn, 99 Va. 460, 39 S. E. 136, is one, which hold that leaving a deed with the clerk to be recorded is admitting a paper to record, within the meaning of the law.

And especially did defendants in error rely upon the case of Manhattan Co. *v.* Laimbeer, 108 N. Y. 578, 15 N. E. 712, referred to in the note. This was a New York case. The statutes of New York relating to the formation of limited partnerships seem to be about the same as those in Virginia.

In this case, one of the special partners had taken the certificate of copartnership to the clerk to be recorded. The clerk failed to record or index the paper, and upon suit brought against the special partners, it was contended they were liable for this reason. The Supreme Court of New York in an able opinion by Justice Peckham held the partners were not responsible for the negligent or careless act of the officer, and

liability was denied. Our Supreme Court, without taking either horn of the dilemma and without discussing the principle laid down in the Vicars-Sayler case or the Manhattan-Laimbeer case or referring to either, disposed of the point in a few lines, by holding the certificate was properly recorded in a separate book kept for the purpose, but was not properly indexed. We are, therefore, still in the dark as to the proper construction of § 2866.

In the report of the case, it is also stated on page 786 of the REGISTER that the Circuit Court refused to give all of the five instructions asked for by defendants.

This does the learned judge of the Circuit Court an injustice and is erroneous. Only instructions numbers one and two were refused; three, four and five were given. There were other interesting points in the case which might be discussed, but the fear of making this article too long has prevented my doing so.

WALLER S. POAGE.

Wytheville, Feb. 24, 1912.